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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE UTAH LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a common law immunity based on speech or debate considerations protects an investigating committee of the Pennsylvania House of Representatives from forced disclosure of documents to a grand jury by *subpoena duces tecum*, where no member of the state legislature is the target of any federal investigation?

STATEMENT OF THE CASE

This *amicus* incorporates by reference the statement of the case set forth in petitioners' petition for a writ of certiorari.

INTEREST OF THE AMICUS[1]

The Utah Legislature, the party filing this *amicus* brief, is an entity comprised of 104 legislative members. Those members have been duly elected and, collectively, are vested with the legislative power of the state by the Utah Constitution.[2]

In order to effectively exercise that legislative power, the Utah Legislature must analyze, consider, and decide vital issues facing the state of Utah. The Legislature believes that the process of reasoned analysis,

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[1]Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

[2]UTAH CONST. art. VI, sec. 1.

sober deliberation, and pragmatic decision depends primarily upon its ability to obtain timely and accurate information. Therefore, it has exercised its constitutional prerogatives and created legislative interim committees and legislative staff offices to assist it in obtaining information about key issues.[3]

The purpose of legislative interim committees is "to investigate and study matters of legislative concern in the interval between general legislative sessions."[4] The interim committees' major duties are "to investigate and study possibilities for improvement in government services

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[3]UTAH CONST. art. VI, secs. 31, 32, and 33.

[4]UTAH CODE ANN. sec. 36-12-3 (1985).

within its subject area" and "to prepare and recommend to the Legislature a legislative program in response to the committee's study agenda."[5]

Legislative staff offices exercise a variety of functions. The Legislative Auditor conducts audits of funds, functions, and accounts of state and local government entities and submits a written report of each audit to each member of the Legislature.[6] The Legislative Fiscal Analyst, among other responsibilities, analyzes the executive budget and makes recommendations to the Legislature on each item or program appearing in it, analyzes and proposes changes

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[5]UTAH CODE ANN. sec. 36-12-5 (1985).

[6]UTAH CONST. art. VI, sec. 33; UTAH CODE ANN. sec. 36-12-15(4) (1985).

for more effective operational economies or administration, and conducts organizational and management improvement studies.[7] The Office of Legislative Research and General Counsel, among other responsibilities, provides research and legal analysis services to legislative interim committees, to standing committees, and to individual legislators, and serves as legal counsel to the Legislature, its committees, and its individual members.[8]

To assist the Legislature, the Senate, the House of Representatives, or any committee of either may "administer oaths, issue subpoenas,

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[7]UTAH CODE ANN. sec. 36-12-13 (1985).

[8]UTAH CODE ANN. sec. 36-12-12 (1985).

compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony" and may file a contempt proceeding in the district court to compel obedience.[10]

The director of each legislative staff office is also empowered by statute to subpoena records and agency officials to obtain information necessary to the scope of his duties.[11]

The Utah Legislature believes that its ability to perform its constitutional function would be severely crippled without adequate tools to obtain information. Utah's interim committees and staff offices frequently

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[10]UTAH CODE ANN. sec. 36-12-19 (1977); See also UTAH CODE ANN. sec. 36-12-11 (1985).

[11]UTAH CODE ANN. secs. 36-12-12, 36-12-13, 36-12-15 (1985).

conduct formal and informal investigations of a variety of state agency activities, including ethics, purchasing, management, and operations. The Utah Legislature believes that its committees and staff offices must be free to conduct investigations on its behalf, unhampered by attempts to influence, obstruct, harass, or disrupt those investigations. The Utah Legislature believes that the Third Circuit's decision allows United States' Attorneys broad powers to disrupt a state legislature's investigations. Allowing the U. S. Attorney to subpoena legislative records, staff, and committee members while an investigation is in progress appears to allow the federal government, by its very intervention, to hinder vital

state government processes.

The Utah Legislature believes that the Third Circuit's decision should be reversed. If it is allowed to stand as precedent, legitimate state legislative investigations of state processes could be impeded through fear of federal subpoenas, undermining the traditional freedom of speech and debate for legislative processes. However, regardless of whether or not this Court reverses the Third Circuit's decision, the Utah Legislature believes that this Court should consider and decide the case, so that state legislatures may conduct investigations with a clear understanding of their rights and responsibilities.

The Utah Legislature submits this amicus brief supporting the Pennsylvania Legislature's petition for certiorari, and urges this Court to issue the writ and decide the case.

SUMMARY OF ARGUMENT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Third Circuit's decision raises an important question about the scope of state legislators' common law immunity. By refusing to apply the doctrine of legislative immunity to shield a Pennsylvania legislative investigation from a federal grand jury subpoena, the Court of Appeals has raised significant questions about

the independence of state legislatures, and about the power of all state legislatures to perform their traditional constitutional functions.

The Third Circuit's decision and rationale conflict with the philosophy and reasoning expressed by this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); *Gravel v. United States*, 408 U.S. 606 (1972); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In light of these cases and the Third Circuit's decision, without further

clarification from this Court about the scope and application of legislative immunity, state legislatures will be deterred from initiating new investigations, and current investigations will be delayed and unreasonably disrupted.

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

The Third Circuit's decision conflicts both in principle and in effect with a decision by the Second Circuit in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), and by the First Circuit in *In re Hampers*, 651 F. 2d 19 (1st Cir. 1981). These decisions support application of the common law

privilege as a means to protect the integrity of the state legislative process.

C. THE DECISION OF THE COURT OF APPEALS MISCONCEIVES *United States v. Gillock*, 445 U.S. 360 (1980), THE IMPLICATIONS OF WHICH ARE IN NEED OF CLARIFICATION BY THIS COURT.

The Third Circuit erroneously relied on this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), as grounds to reject the Pennsylvania Legislature's argument that the legislative immunity privilege protects its legislative committee investigation from a federal grand jury subpoena. This Court's holding in *Gillock* -- that the common law speech and debate privilege did not bar federal prosecutors from

introducing evidence of a state representative's support for particular legislation in a criminal prosecution against the representative for bribery -- prevented the speech and debate privilege from completely immunizing the defendant legislator from criminal liability. In this case, however, the U.S. Attorney is neither prosecuting a legislator or legislative staff member for any violation of federal law, nor is he conducting a criminal investigation of the activities of the legislative committee, its members, or its staff. Consequently, under these facts, application of the legislative immunity privilege to protect the integrity of the legislature's investigatory process has a less

significant effect on the federal government's interests than did the situation in *Gillock*, where application of the privilege would have resulted in the exclusion of evidence in a criminal prosecution. Instead, the Third Circuit's holding has a much more intrusive effect than the holding in *Gillock*. By requiring compliance with this type of investigative subpoena, the Third Circuit allows the federal government to interfere with and impede the state legislative process itself.

At the very least, the Third Circuit's application of this Court's decision in *Gillock* raises substantial questions about legislative immunity. Without some clarification of the scope and application of the

legislative immunity doctrine, state legislatures will be unable to assess or predict which of their activities are protected by legislative immunity. This uncertainty could cause legislators to be reluctant to pursue important investigations, or to comment on important public issues, because of fear of federal grand jury intervention and interference.

ARGUMENT

This *amicus* incorporates by reference the arguments set forth in petitioners' petition for a writ of certiorari.

CONCLUSION

For the reasons stated in this brief and in the Petition for a Writ of Certiorari filed on behalf of the Pennsylvania House of Representatives, *amicus* respectfully request that Pennsylvania's petition for a writ of certiorari be granted.

Respectfully submitted,

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